PETITION FOR WRIT OF CERTIORARI

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No. ____

In The
Supreme Court of the United States

ADNAN BUSHATI, VALBONA BUSHATI,
EUGENT BUSHATI, and ERISA BUSHATI,
Petitioners,

v.

ERIC H. HOLDER, JR., United States Attorney General,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals deny the petitioners their fundamental rights to due process under the Fifth Amendment by affirming the decisions of the Board of Immigration Appeals and the Immigration Judge in an egregious departure from the accepted and usual course of judicial proceedings?

RULE 14.1 (b) STATEMENT

A list of all parties to the proceedings in the court whose judgement is the subject of this petition is as follows:

Petitioners: Adnan Bushati, Valbona Bushati, Eugent Bushati and Erisa Bushati.

Respondent: Eric H. Holder, Jr., Attorney General of the United States of America.[1]

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, Attorney General Michael Mukasey, has been replaced by Eric H. Holder, Jr., the current officeholder.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Adnan Bushatii, Valbona Bushati, Eugent Bushati and Erisa Bushati ask that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, *Bushati et al., v. Mukasey*, Docket No., 08-3291 (6d Cir. 2009), is attached to this petition as **Appendix A**. The agency opinions issued by the Immigration Judge, then adopted and affirmed by the Board of Immigration Appeals, *In re Adnan Bushati et al*, Nos. 98-144-265/98-144-266/98-144-267/98-144-268 (BIA February 27, 2008), are attached hereto as **Appendices C and B**.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment denying the timely submitted petition for rehearing on March 31, 2009. The Court of Appeals denied Bushati's timely petition for review of the decision of the Board of Immigration Appeals on February 18, 2009. The order denying review of the agency appeal is attached hereto as **Appendix D**. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprive the Bushati family of their rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the substantial evidence standard, as a means of reviewing a claim for asylum. The Circuit Court in applying the substantial evidence standard to review the matter of Adnan Bushati, his wife, Valbona Bushati and his two children, Eugent and Erisa Bushati misapplied the standard by failing to review the record in a cumulative manner, and further failed to acknowledge that the Immigration Judge and the BIA relied on an improper standard for evaluating Mr. Bushati's credibility in their decisions in clear violation of Sixth Circuit precedent. The Court of Appeals' decision is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. Bushati and his family' Fifth Amendment rights. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decisions below.

The Bushati's are natives and citizens of Albania who suffered persecution in their native country of Albania. Adnan Bushati arrived in the United States

for the final time on December 10, 2003. He filed for asylum in May 2004. His family members were classified as derivative applicants. On March 17, 2006, Mr. Bushati and his family appeared before Immigration Judge Elizabeth A. Hacker (hereinafter "IJ), who denied their applications for asylum and related relief.

Mr. Bushati testified in a credible manner, consistent with his asylum application and supporting documents. He testified regarding numerous incidents of persecution that occurred to him between 1991 and 2003, which he related to his political activities on behalf of the Democratic Party in Albania.

Immigration Judge Elizabeth A. Hacker found Mr. Bushati's testimony not credible. However, this finding was not based upon the testimony itself. Instead, it was based upon the quality of Mr. Bushati's corroborating evidence. In her decision, the IJ clearly emphasizes the reason for her credibility finding. She states: "In sum, the respondent has not met the burden of establishing credible testimony with credible corroborative evidence." See **Appendix C**. In other words, in the IJ's view, the corroborative evidence determines the credibility of the testimony.

In determining what was required to corroborate Mr. Bushati's claims, the Immigration Judge relied on the Real ID Act of 2005, which was not applicable to this case. The reliance of the IJ on the Real ID Act caused her to reject, as not credible, the testimony of Mr. Bushati. The basis for her finding was that statements made during the course of Mr. Bushati's testimony were not corroborated by the testimony of

others or documentary corroboration. See **Appendix C**.

The Bushati family submitted a timely appeal to the Board of Immigration Appeals (hereinafter "BIA") soon thereafter, arguing that the IJ had applied an incorrect standard of proof and corroboration in assessing Mr. Bushati's testimony. The appeal urged the BIA to reconsider the decision of the IJ to allow for the proper evaluation of the whole record, and evidence submitted to consider whether the applicants had met their burden in demonstrating both a fear of past and future persecution.

Apparently knowing that the IJ used an improper standard of proof, the BIA tried to remedy this error in the IJ decision by finding another reason to deny the credibility of Mr. Bushati's testimony. The BIA decision states that "the respondent's testimony differed substantially from his application regarding his role in the 1997 and 2000 elections, and the chain of events leading to his 1997 arrest. See **Appendix B**. However, this assertion is not reflected in the record.

On February 27, 2008, the Board of Immigration Appeals affirmed the Immigration Judge's decision. See **Appendix B**.

On March 14, 2008, the Bushatis filed a petition for review of the agency's determination with the Sixth Circuit Court of Appeals. In its decision, the Sixth Circuit denied the petition for review on February 18, 2009. See **Appendix A**. The Sixth Circuit issued a decision finding that under the substantial evidence standard, the IJ and BIA had properly denied Mr. Bushati's applications.

The Sixth Circuit, in denying Mr. Bushati's Petition for Review, states that "the Immigration Judge, in support of her finding that Bushati was not credible, also described specific examples of inconsistencies in Bushati's testimony that go to the heart of Bushati's claim." See **Appendix A**. However, they can cite not a single example, and are left to either generalize that there were "inconsistencies between facts in Bushati's asylum application and his testimony," or raise issues that have nothing to do with the quality of Mr. Bushati's testimony, such as "the failure of Bushati to explain the lack of corroboration, authentication, or verification of any of his testimony or supporting documentation." See **Appendix A**.

Again, the claim of inconsistencies is not supported by the record, and the other claim appears to be based on an analysis consistent with the REAL ID Act of 2005, which is not the relevant law and precedent applicable to this case.

The Bushati Family asserts that the Court of Appeals for the Sixth Circuit in contravention of precedent violated their rights under the Fifth Amendment to due process of law by misapplying the substantial evidence standard, in their failure to review the record as a whole, and further in relying erroneously on the credibility finding of the Immigration Judge, based upon an improper standard of proof.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision in this case was an egregious departure from the accepted and usual course of judicial proceedings. They affirmed the

decisions of the BIA and IJ although both failed to render a judgment on the applications of Petitioner Adnan Bushati under the proper standard of proof.

I. THE TESTIMONY OF ADNAN BUSHATI WAS CREDIBLE

The first determination in evaluating Mr. Busati's applications for asylum, withholding and relief under the Convention Against Torture is whether the applicant has testified credibly in support of his claim.

All other findings flow from this determination. If an applicant's testimony is credible, it can be the basis for a grant of asylum even in the absence of corroborative evidence. Under Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987), "Although every effort should be made to obtain such evidence, the lack of such evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."

Under Mogharrabi, the testimony is evaluated first, to determine its credibility. Then, the Court, if necessary, looks to supporting evidence to determine whether an applicant for has sustained his burden of proof.

The REAL ID Act of 2005 altered the burden of proof in the following ways. Now, "where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the

applicant does not have the evidence and cannot reasonable obtain the evidence."

Also, in making a credibility determination the IJ may consider "the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor."

"Any other factor" may include the failure to provide corroborative evidence requested by the IJ.

During closing argument, Mr. Bushati's attorney argued that his client had testified credibly, and that under Matter of Moghorrabi, *supra*, the testimony alone can suffice to establish his burden of proof for a grant of political asylum. The IJ interrupted this argument to advise Petitioner's attorney that Matter of Mogharrabi had been modified by the REAL ID Act of 2005. Then, in her decision, the IJ evaluated the Petitioner's testimony consistent with the standards outlined in said Act.

However, the REAL ID Act of 2005 does not govern this case. The REAL ID Act of 2005 governs asylum applications made on or after May 11, 2005. In re S-B-, 24 I&N Dec. 42 (BIA 2006) The application for asylum submitted by Mr. Bushati was dated May 28, 2004 and submitted on June 10, 2004.

The IJ clearly makes her finding under the REAL ID Act of 2005 when she states: "In sum, the respondent has not met the burden of establishing credible testimony with credible corroborative evidence." In this case, the IJ does not make a credibility determination based upon the testimony. In her decision, Mr. Bushati's credibility is determined by the quality of his corroborating documents.

If this case was decided based on the standards enunciated in Matter of Mogharrabi, and in accordance with Sixth Circuit precedent, Mr. Bushati's testimony would have had to be deemed credible.

Once Mr. Bushati's credibility was established, his testimony, accepted as true, would establish that he is applied for political asylum within a year of his last entry into the United States, and that he has been a victim of past persecution such that he warrants a grant of political asylum.

The BIA and the Sixth Circuit Court of Appeals ignored the conclusion of the IJ on the issue of credibility. Instead, they searched the IJ's decision to find other grounds for an adverse credibility finding.

A. THE BIA AND SIXTH CIRCUIT RELIED ON NON-EXISTANT OR *DE MINIMIS* INCONSISTENCIES IN FINDING ADVERSE CREDIBILITY.

The Sixth Circuit has stated that it will review the adverse credibility determinations of the IJ and the BIA under the "substantial evidence" standard in order to guarantee that it is supported by "specific reasons going to the heart of the applicant's claim." *See* Sylla v. INS, 388 F.3d 924, 926 (6th Cir. 2004). Furthermore, any inconsistencies relied upon by the IJ must be material to the claim, and actually present in the record. *See* Id. The Sixth Circuit has overturned adverse credibility determinations in such proceedings where it has determined that the IJ's decision was trivial, inconsistent with the evidence, or a clear misconstruction of the evidence. *See* Mece v. Gonzales, 415 F.3d 562 (6th Cir. 2005).

In the instant matter the BIA and Sixth Circuit rested their adverse credibility findings on non-existent or *de minimis* inconsistencies. These alleged inconsistencies cannot however serve as the basis for an adverse credibility finding. *See* Pergega v. Gonzales, 417 F.3d 623, 627-31 (6th Cir. 2005) [Where there were irrelevant inconsistencies or nonexistent inconsistencies, BIA reversed].

The BIA employs a three part test to determine whether it will defer to the IJ's credibility determination. Matter of S-A-, 22 I&N Dec. 1328, 1331 (BIA 2000) [Reversing IJ and relying on test established in Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998). The BIA will defer to an adverse credibility determination based on inconsistencies and omissions

regarding events central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions." Matter of A-S-, 21 I&N Dec. 1106, 1109 (BIA 1998); Matter of S-A-, 22 I&N Dec. 1328, 1331 (BIA 2000).

There are two clear examples where the IJ, the BIA and the Sixth Circuit describe incidents where they believed Mr. Bushati's testimony differed from his written asylum application. One incident was an arrest that occurred in September 1998.

The IJ states, "today, in talking about the Azem Hajdari incident, the respondent made no mention of the fact that he had been detained because of his driving individuals to the funeral. Rather, in his testimony, the respondent testifies that he was arrested during the funeral and charged with having caused the turmoil which surrounded the funeral..."

The BIA, states "Respondent's testimony differed substantially from his application regarding...the chain of events leading to his 1999 arrest.

The Sixth Circuit merely states "the IJ described inconsistencies that go to the heart of Bushati's claims." Presumably, the IJ's description of Mr. Bushati's testimony regarding his 1998 arrest was one such example.

The record does not accord with the forgoing analysis. The asylum application states: "I was detained again in September 14, 1998 in Shkoder, when I was returning home from the funeral of democratic leader, Azem Hajdari. I was held for 24 hours in jail. I was beaten and threatened with my life for using my car to give a ride to other members of the Democratic Party to go to the funeral..."

In his testimony, Mr. Bushati answers questions from his attorney as follows:

Q. Sir, sir, following the death of this man, did anything unusual happen to you?
A. As I was coming, I was coming back from the funeral of Azem Hajdari, September 14, we were four people in the car. The police comes with the excuse of the turmoil that took place in 1998 in Tirana. They keep us for 24 hours.
Q. Where did they keep you?
A. In Police Station in Shkoder.
Q. Did they say anything to you?
A. You are the person who have caused this turmoil during the time that the funeral took place. And we were always, you know, peaceful people, people that went over there to participate in this funeral.

Mr. Bushati then testified to being beaten in custody. The issue of this arrest was not mentioned in questioning by the Assistant Chief Counsel or the IJ.

From the application and testimony it can be determined that Mr. Bushati's claim is that he used his vehicle to transport Democratic Party supporters

from Shkoder to the funeral of Azem Hajdari in Tirana. On his way home, he was arrested along with the other persons in his vehicle. The arresting officers, as an "excuse" or pretext for the arrest, claimed that he was causing turmoil during the funeral in Tirana. He was held for 24 hours, and he was beaten.

While he did not mention every detail relayed in his asylum application, this is easily explained as he was not asked questions that would have elicited all the details in his asylum application. If the IJ wanted to test Mr. Bushati's veracity she could have simply asked Mr. Bushati the following question: You told us the pretext used for arresting you on that day, namely that you were causing turmoil during the funeral, can you also tell us what you believe to be the actual reason you were arrested?

She, instead, chose not to ask any questions that would have developed Mr. Bushati's testimony or that could have allayed her concerns regarding his testimony.

Further, Circuit Courts have held that when an inconsistency is not self-evident, an IJ may not rely on it to support a credibility determination without first bringing the perceived discrepancy to the alien's attention, thereby giving the alien an opportunity to address and perhaps reconcile the seeming inconsistency, to the IJ's satisfaction, at the least. "Where the perceived incongruities in an asylum applicant's testimony are not plainly obvious, an IJ cannot rely on them to support an adverse credibility ruling without first identifying the alleged inconsistencies for the applicant and giving the applicant an opportunity to address them." Ming Shi

Xue v. Board of Immigration Appeals, 439 F.3d 111, 121 (2d Cir. 2006).

The Courts further held that it is an "error for an IJ to find an applicant's testimony inconsistent without first raising the putative discrepancies during asylum proceedings so that the petitioner has a chance to provide what may be satisfactory explanations for the supposed problem." Id at 122. *See also* Jin Shui Qiu v. Ashcroft, 329 F.3d 140, 152 (2d Cir. 2003).

Here, there was no inconsistency. The BIA and Sixth Circuit accept without question the IJ's faulty analysis, also confusing the reason Mr. Bushati was arrested with the pretext for his arrest. It is clear error to use this as a basis for concluding that Mr. Bushati's testimony was not credible.

A second incident concerned events surrounding the arrest of Mr. Bushati in October 2000.

The IJ states that Mr. Bushati claims that he was arrested because he reported election fraud. She then complains that this statement is not corroborated by any other evidence in the record.

The BIA states the "Respondent's testimony differed substantially from his application regarding his role in the ... 2000 election..."

The Sixth Circuit again only states that "the IJ described inconsistencies that go to the heart of Bushati's claims."

The asylum application describes the October 2000 arrest as follows. "I was detained in October 10, 2000,

several days after the local elections and kept in jail for another two days. I was beaten up and threatened with my life again and again.

In his testimony he answered his attorney's questions as follows:

> Q. What was the date again?
> A. October 1 of the year 2000, that's where the elections were about to take place. October 10, I was stopped and I was, I got arrested.
> Q. Where were you stopped?
> A. At home, at home.
> Q. All right, and what happened?
> A. For two days, you can understand that always the people used to come one after the other, the policemen, to try to prove themselves upon my body.
> Q. All right. And did they say anything to you?
> A. Yes. Because in the area where I was an observer, it took ?? a lot of votes were stolen, and these things took place there. But we reported this. And they took ?? All Albania and all Democratic Party of Albania, then they went into massive protests. And for this reason I got arrested in October 10.

Now, although the exact cause for Mr. Bushati's arrest is not stated in his asylum application, there is clearly no inconsistency that goes to the heart of the claim, as the Sixth Circuit contends. Additionally, there is no substantial difference between Mr. Bushati's testimony and his asylum application, as the BIA contends.

This can not form the basis for a negative credibility finding.

Accordingly, the IJ's and consequently the BIA's and the Sixth Circuit's finding of inconsistency is contrary to law, and thus, in error.

II. MR. BUSHATI ESTABLISHED THAT HE IS ELIGIBLE FOR RELIEF IN THE FORM OF A GRANT OF ASYLUM, AS HE HAS SHOWN THAT HE SUFFERED PAST PERSECUTION.

Mr. Bushati presented credible, sufficient, and detailed testimony as to past persecution he and his family suffered at the hands of the police and SP supporters, which persecution places them squarely within the meaning of "refugee" as stated in the Immigration and Nationality Act (hereinafter "the Act"). *See* INA §101(a)(42). It is Petitioners' contention that they met their burden of proof as to their eligibility for asylum and withholding of removal, and the contrary finding of the IJ, and the BIA's subsequent upholding of that finding, are erroneous and should therefore be overturned.

To be eligible for a grant of asylum, an alien must first show that he or she is a "refugee" within the meaning of Section 101(a)(42) of the Act. *See* INA §101(a)(42); Pilica v. Ashcroft, 388 F.3d 941, 950 (6th Cir. 2004). To make this showing, an alien must prove that he or she is either unable or unwilling to return to his or her country based upon past persecution suffered or a well-founded fear of persecution on account of his or her religious beliefs and practices, ethnicity, national origin, membership in a particular social group, or, as in the instant matter, political

beliefs. *See* Mikhailevitch v. INS, 146 F.3d 384, 389 (6th Cir. 1998).

"Persecution", as employed in the statute, has been defined by the BIA and generally accepted by the Circuit Courts as meaning "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded offensive." *See* Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); Li v. Attorney General of the U.S., 400 F.3d 157 (3d Cir. 2005); Montoya-Ulloa v. INS, 79 F.3d 930 (9th Cir. 1996); Guevara-Flores v. INS, 786 F.2d 1242 (5th Cir. 1986); *see also* Ali v. Ashcroft, 366 F.3d 407, 410 (6th Cir. 2004) (The Court stated that an act of "persecution" must entail "punishment or the infliction of suffering or harm"); *see specifically* Cannales-Vargas v. Gonzales, 441 F.3d 739, 744-46 (9th Cir. 2006)(stating that anonymous death threats are sufficient to establish...persecution).

Petitioners offered credible, detailed testimony as to the persecution they suffered in Albania, and from which they fled. Starting in May 1991 and continuing through August of 2003 Lead Petitioner and his family suffered persecution, threats to their lives and personal freedom, political pressure and police abuse and neglect. He was repeatedly detained, beaten and threatened with death because of his political opinion. Lead Petitioner's son was nearly kidnapped and Petitioner's father died from the stress resulting from this incident. Petitioners assert that they have suffered mental, emotional and physical harm sufficient to meet the standards for past persecution as set forth above. *See* Cannales-Vargas, 441 F.3d at 744-46 (9th Cir. 2006). Accordingly, it is Petitioners' assertion that they have proven past persecution,

filing for asylum within one year of last entry into the United States, and meet the meaning of "refugee" as set forth in INA § 101(a)(42), and are therefore eligible for the grant of asylum. Thus, the IJ's denial of a grant of asylum and the attendant rebuttable presumption of a well-founded fear of persecution upon the erroneous finding that Petitioners failed to make a showing of past persecution was made in clearly controvertible error. Consequentially, the BIA's and Sixth Circuit's affirmance of the IJ's decision constitutes substantial error, and should therefore be overturned.

A. BUSHATI HAS A WELL-FOUNDED FEAR OF PERSEUCITION SHOULD HE BE RETURNED TO ALBANIA

Under Matter of Mogharrabi, the BIA's definition of a "well-founded fear of persecution" as a subjectively-held fear of persecution which would also be held by a reasonable person under like circumstances. *See* Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987). The objective component requires the production of facts supporting a reasonable fear by a showing of credible, direct and specific evidence. Mogharrabi, 19 I & N Dec. at 446. The Board has established a four-part, conjunctive test, which must be met; an applicant must show that: (1) he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is aware or could become aware that the applicant possesses this belief or characteristic; (3) the persecutor has the capability of punishing the applicant; and (4) the persecutor has the inclination to punish the applicant. Matter of Mogharrabi, 19 I & N Dec. at 446. Additionally, the

potential harms giving rise to the well-founded fear of persecution faced by the alien in the country of removal must be imposed, for the purposes of the instant matter, as a result of his political opinions and affiliations. *See* INA §241(b)(3).

Lead Petitioner has offered credible testimony, supported by valid documentary evidence, to show that his fear of persecution if forced to return to Albania, is well-founded and objectively reasonable under all applicable standards. His political opinion is clear. That his persecutors are aware of this opinion has been made clear by their comments and threats to him. That they have the capability and inclination to punish the applicant is evidenced by their past persecution of Petitioner as well as by their threats to do so in the future, and their position as police officers.

Petitioners have demonstrated a subjectively held fear of persecution, which is objectively reasonable under the circumstances. Petitioners assert that under the controlling and persuasive precedent (respectively) of Ali v. Ashcroft, 366 F.3d 407 (6th Cir. 2004), and Cannales-Vargas, 441 F.3d at 744-46 (9th Cir. 2006), as well as the BIA standards found in Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987), that they have made a showing of a well-founded fear of persecution in this matter. The BIA contravened its own precedent in upholding the IJ's determination that the Petitioners did not have a well-founded fear of persecution on account of his political opinion.

Further, the government's defense to Petitioners well-founded fear of persecution is that the DP is currently in power. However, a showing of past persecution sets up a rebuttable presumption of a well-

founded fear of future persecution, which is overcome *only if* "a preponderance of the evidence establishes that a change in circumstances in the applicant's country of nationality has occurred such that the applicant's fear is no longer well-founded." 8 C.F.R. § 208.13(b)(1)(i)). Mere recitation of election results by the government is not sufficient to overcome such a presumption. Additionally, the BIA does not even address this alleged change, relying entirely, on the IJ erroneous adverse credibility finding.

Thus, for the IJ, and Board in its affirmance, and the Sixth Circuit to rely upon the election result, without any further discussion, to prove that a reasonable person in Petitioner's situation would have no fear of persecution whatsoever is in error and not supported by substantial evidence. For the reasons stated, the IJ's denial of Petitioners' request for withholding of removal and the BIA's and Sixth Circuit's subsequent upholding of that decision were both made in error, and should be overturned.

B. THE IJ AND BIA RELIED ON IMPROPER DEMANDS FOR ADDITIONAL CORROBORATIVE EVIDENCE IN FINDING PETITIONER'S TESTIMONY INCREDIBLE

The BIA, in its decision, finds that the Petitioner "failed is his (sic) burden to establish by clear and convincing evidence that his application was timely filed." The Board notes that Petitioner failed to corroborate his allegation with the testimony of his son who was in albania (sic) at the time." However, the Board fails to address the fact that it is the duty of the IJ to develop the record as well.

An IJ's concern for more specific information does not constitute a valid ground for denying asylum where the applicant was not put on prior notice that information submitted was insufficient. Qui v. Ashcroft, 329 F.3d 140, 153-54 (2d Cir. 2003) [Reversed BIA under the Diallo and Alvarado-Carillo standard because the BIA did not point to the specific pieces of missing information that the applicant should have produced and did not demonstrate that the corroborative documentation was reasonably available to the applicant]. Paramasamy v. Ashcroft, 295 F.3d 1047, 1054 (9th Cir. 2002) [Failure to provide letter from mother corroborating applicants account of sexual abuse was impermissible because IJ never questioned applicant about the perceived deficiency]; Akinmade v. INS, 196 F.3d 951, 957 (9th Cir. 1999) [Reversed denial of asylum].

In her decision the IJ lists a number of instances where Lead Petitioner's credibility is called into question owing to a lack of corroborative documentation, yet the record demonstrates that such instances the cause for the documentation not being in the record is either reasonably explained or the evidence does, in fact exist in the record.

To wit: The IJ questioned Petitioner as to why he did not have his father's death certificate to corroborate his testimony that his son had almost been kidnapped, when Lead Petitioner's son himself provided corroborative testimony. She questioned why there wasn't an affidavit from Astrit Bushati, when, in fact, one was provided She questioned why Petitioner did not have the letter from the "procurator", when Petitioner explained that it is impossible for him to obtain a copy of this kind of summons. She questioned

why he did not have documentation of his arrests, when Petitioner explained that while he was detained it was without due cause and thus, without a paper trail. She questioned why the affidavits submitted from Albania did not state with specificity the problems he suffered, when there is an affidavit from Lorenc Luka, chairman of the DP stating that Petitioner was "mercilessly beaten up and tortured during the year 1991."; Another affidavit stated that he had "a series of problems with the police. These problems continued for many years; detentions in the prison cells, beatings and threats to his life."; another that states that he took an active part in the "Nano-Ik" movement in 2003, had a series of problems with the police because of this participation and was obliged to leave Albania with his son because of these problems; another states that "During the first week of May 2002 there was an attempt to forcefully kidnap the son of Mr. Adnan Bushati named Eugen Bushati, an attempt which failed." Additionally, Petitioner provided affidavits by individuals who personally witnessed Petitioner be apprehended by the police in regard to both the 1991 and September 1998 incidents. These explanations and submissions clearly demonstrate that the supposed missing corroborative evidence which the IJ deemed "missing", and upon which she based her finding, is in fact present or accounted for as per the dictates of INA §§208(b)(1)(B), 240(c)(4), 241(b)(3)(C).

For the foregoing reasons Petitioners assert that the IJ erred in finding Petitioners testimony inconsistent, and that the IJ improperly based her adverse credibility finding on such errors. Petitioners further assert that the BIA and Sixth Circuit similarly erred in relying on the IJ's findings. Accordingly, since

Petitioners have demonstrated a well founded fear of persecution on the merits, without a basis for an adverse credibility finding, Petitioner's testimony that he last entered the United states on December 10, 2003, and the corroborative documentation from the Albanian hospital that Petitioner visited in Shkoder that demonstrates he was in Albania as of June 1, 2003, are sufficient to make him eligible for asylum. Petitioners therefore respectfully request that this Honorable Court vacate the decision of the Sixth Circuit and remand the case for proceedings in accordance.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHE & ASSOCIATES, P.C.

BY:

CHARLES CHRISTOPHE, Esq.*

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*Counsel of record

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 08-3291

[Filed February 18, 2009]

ADNAN BUSHATI, et al.,	)
	)
Petitioners,	)
	)
v.	)
	)
MICHAEL MUKASEY, Attorney General,	)
	)
Respondent.	)
	)

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

BEFORE: MERRITT, COLE, and SUTTON, Circuit Judges.

MERRITT, Circuit Judge. Petitioner Adnan Bushati, as lead petitioner, on behalf of himself, his wife and two minor children, as "derivative" petitioners, seeks review of the final order of removal issued by the Board of Immigration Appeals, which

affirmed the immigration judge's denial of Bushati's petitions for asylum, withholding of removal, and protection under the United Nations Convention Against Torture. As to the asylum issue, the question is whether we lack jurisdiction due to the untimeliness of the petition, and the withholding of removal questions are whether petitioner has made the requisite showing of "clear probability" of future persecution under the Immigration Act, 8 U.S.C. § 1231(b)(3), or the "likelihood of torture" under the U.N. Convention Against Torture, implemented by regulation issued by the Attorney General. 8 C.F.R. § 1208.18(a)(1). We conclude that the asylum petition is untimely and that petitioner has not otherwise made the requisite showing for withholding of removal.

Bushati is an Albanian citizen. In Albania, he was a member of the Democratic Party. He asserts that because of his political affiliation he was persecuted by the Albanian police at various times between 1991 and 2003. In November 2001, he legally entered the United States as a non-immigrant visitor for pleasure with authorization to stay for a period not to exceed August 6, 2002. The Bushati children entered the United States at an unknown time and place.

Bushati filed an application for asylum on June 10, 2004, two and a half years after entry, listing his wife and children as derivative applicants. Bushati and his wife were then charged with being subject to removal for staying beyond the period permitted. The children were also charged with being subject to removal as aliens who arrived without being admitted or paroled. All the Bushatis appeared before an immigration judge and, through counsel, conceded removability. The

Bushatis appeared, again with counsel, at a multi-day evidentiary hearing in March 2006. On March 17, 2006, the immigration judge rendered her oral decision denying Bushati's application. (J.A. at 16.) The Bushatis timely appealed the decision to the Board of Immigration Appeals, which adopted and affirmed the immigration judge's decision in a brief opinion on February 27, 2008. (J.A. at 10.) This petition for review followed.

I. Asylum Application Untimely

The Immigration and Naturalization Act requires that an asylum applicant "demonstrate[] by clear and convincing evidence that the application has been filed within one year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). This requirement is subject to exceptions in cases when "the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within" the required one-year period. 8 U.S.C. § 1158(a)(2)(D). Another section of § 1158 converts the limitations issue into a jurisdictional issue: "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding whether changed or extraordinary circumstances exist to excuse an application for asylum that is filed later than one year after entry into the United States. 8 U.S.C. § 1158(a)(3).

Bushati testified that he left Albania on November 9, 2001, and came to the United States, staying until May 2002. He testified that he returned to Albania that month because his son had been targeted by

kidnappers and his father passed away. Because he could not find his Albanian passport, Bushati testified that he left the United States through Canada, flew to Greece and drove to Albania. Bushati presented no documentary or other evidence of this travel back to Albania. Bushati testified that he returned to the United States with his son in December 2003, but he had no documentation to verify the date of his return.

The immigration judge found that Bushati failed to prove that his asylum application, filed on June 10, 2004, was timely because it was filed more than one year after his last entry into the country. Based on the lack of supporting documentation or other evidence demonstrating either that Bushati left the United States in 2002 or returned in 2003, as noted above, the immigration judge found that Bushati last entered the United States in November 2001, making his asylum application in June 2004 untimely. The Board agreed with the immigration judge's finding that the asylum application was not timely filed. We conclude that this finding is well supported by the evidence. The petitioner offers no evidence, other than his own testimony, of the trip — no passport stamps or other evidence of a series of flights to or return from Greece. We, therefore, lack jurisdiction to review the denial on the ground of untimeliness of Bushati's application for asylum.

II. Withholding of Removal

Bushati also seeks removal of the Board's decision to deny him withholding of removal under the Immigration and Naturalization Act and the Convention Against Torture.

Bushati testified that, beginning in 1991, he became a member of the Albanian Democratic Party, which opposed the then-in-power communist regime. The Communist Party has been out of power for more than a decade, and the Democratic Party is now the governing party. Bushati testified that because of his membership in the Democratic Party, he was detained, beaten and otherwise harassed on numerous occasions between 1991 and his departure from Albania in 2001. Bushati testified that he was appointed to an election commission in June 1997 to oversee elections that year and was arrested by police. He testified that the police told him that he was beaten for reporting "stolen votes by the Socialist Party" at the polling place he was monitoring. He testified that he was arrested and beaten again in September 1997. Bushati testified that he was then arrested and detained in September 1998 for causing "turmoil" at the funeral for the then-Democratic Party leader and that he was arrested in October 2000 for reporting vote fraud in an election and participating in public demonstrations concerning the election.

The immigration judge stated that three of the documents submitted by Bushati to verify his membership in the Democratic Party were all from the same person, were dated on the same date and contained only very general statements concerning his alleged detentions and mistreatment due to political affiliation. The immigration judge noted that none of the documents were originals. Nor did Bushati explain during the hearing how he obtained them or why the documents submitted to verify his detentions and mistreatment were all from the same person. She also noted that the generalized nature of the documents did

not provide the type of specific information that can be given great weight.

In an important finding, the immigration judge also noted that the content of the documents was in conflict with the May 2001 Profile of Asylum Claims and Country Conditions, which reported that the last Albanian elections had been orderly and calm, with few incidents of violence, and that international monitors determined the election to be free and fair. The Profile also noted that political reprisals, especially of a physical nature, had been rare since 1997. She concluded that this did not support Bushati's claim that he was persecuted in 2000 as a result of his work as an election commissioner and monitor. Reports in the record, including the 2004 Profile, demonstrate the same conditions prevailed during the 2003 elections as well. The Profile reported that there is virtually no evidence that individuals were targeted on political grounds after 1997 and that Albanians had more to fear from a high crime rate.

We also take judicial notice of the most recent Country Report on Human Rights Practices in Albania, which was issued by the United States Department of State on March 11, 2008. The Report notes that there were no politically-motivated disappearances in 2007 and no reports that the government or its agents committed arbitrary or unlawful killings. The Report states that there is still some violence in Albania, but that it arises from "revenge killings, criminal gangs and organized crime," not from the government. The police system is also described as "weak"and "corrupt," due mostly to low wages as opposed to government influence or authorization.

The immigration judge, in support of her finding that Bushati was not credible, also described specific examples of inconsistencies in Bushati's testimony that go to the heart of Bushati's claims. The specific reasons identified by the immigration judge in support of the adverse credibility finding included (1) the inconsistencies between facts in Bushati's asylum application and his testimony; (2) the failure to present any corroborating witnesses for his claims, despite the presence of his wife and children at the hearing; (3) the documents submitted to support his application were not originals, they all appeared to have been executed on the same date with three of the four documents signed by the same person; and (4) the failure of Bushati to explain the lack of corroboration, authentication or verification of any of his testimony or supporting documentation.

Because the immigration judge described inconsistencies that go to the heart of Bushati's claims, we cannot say that denial of withholding of removal under the Immigration Act or the Convention Against Torture is manifestly contrary to law. Given our deferential standard of review, we deny Bushati's petition for review of the Board's decision to deny withholding of removal.

For the foregoing reasons, we deny Bushati's petition seeking review of the Board's denial of his application for asylum and withholding of removal under the Immigration and Naturalization Act and the Convention Against Torture.

APPENDIX B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

DILLON, JOHN RYDER, ESQ.
18514 MACK AVE., SUITE 104
GROSSE POINTE FARMS, MI 48236-0000

Office of the District Counsel/DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: BUSHATI, ADNAN A98-144-265
Riders: 98-144-266 98-144-267 98-144-268

Date of this notice: 2/27/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
/s/
Donna Carr
Chief Clerk

Enclosure

Panel Members:
GRANT, EDWARD R.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A98 144 265 - Detroit, MI
A98 144 266
A98 144 267
A98 144 268

Date: FEB 27 2008

In re: ADNAN BUSHATI
VALBONA BUSHATI
EUGENT BUSHATI
ERISA BUSHATI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
John Ryder Dillon, Esquire

ON BEHALF OF DHS: Catherine M. Pincheck
Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the March 17, 2006, decision of the Immigration Judge who found that the lead respondent had not met his burden to

establish that he timely filed his application for asylum, and that due to incredible testimony and lack of corroboration, the respondents are not eligible for withholding of removal or protection under the United Nations Convention Against Torture (I.J. at 5-8). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision").

The lead respondent's claim that he was in Albania in 2003 was, for reasons stated by the Immigration Judge, unpersuasive in light of the complete weight of the evidence, and the respondent's failure to corroborate his allegations with the testimony of his son, who was in albania at the time. The respondent failed is his burden to establish by clear and convincing evidence that his application was timely filed. I.J. dec. at 5-8.

With respect to the adverse credibility finding, we are not persuaded that it is clearly erroneous. *See generally* 8 C.F.R. § 1003.1(d)(3)(i) (stating that the Board shall review factual determinations, including credibility findings, "only to determine whether the findings of the Immigration Judge are clearly erroneous"). The respondent's testimony differed substantially from his application regarding his role in the 1997 and 2000 elections, and the chain of events leading to his 1998 arrest. All of these events are at the core of his claim. While the respondent presented some documentary evidence, the Immigration Judge noted deficiencies in those documents, and rightly questioned why the lead respondent had not presented

members of his family, who were present in the courtroom, as witnesses to corroborate his account. Accordingly, we affirm the Immigration Judge's finding that the respondents have not established eligibility for withholding of removal.

While the respondents appealed from the denial of protection under the CAT, they have presented no specific arguments on that issue, and we find no reason to disturb the decision of the Immigration Judge to deny this application.

Accordingly, the appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Detroit, Michigan

Files A 98 144 265
A 98 144 266
A 98 144 267
A 98 144 268

March 17, 2006

In the Matters of

ADNAN BUSHATI,	)	IN REMOVAL
BALBONA BUSHATI,	)	PROCEEDINGS
EUGENT BUSHATI,	)	
ERISA BUSHATI,	)	
	)	
Respondents	)	

CHARGES : Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended - remained longer after admission as a non-immigrant; and

Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended - alien present in the United States without being admitted or paroled or who arrived

at a time and place other than as designated by the Attorney General.

APPLICATIONS: Asylum; withholding of removal; and Convention Against Torture

ON BEHALF OF RESPONDENTS:

John R. Dillon, Esquire
18514 Mack Avenue, Suite 104
Grosse Point Farms, MI 48236

ON BEHALF OF DHS:

Catherine Pincheck, Esquire
Assistant Chief Counsel
333 Mount Elliot
Detroit, MI 48207

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are a family of natives and citizens of Albania. The Department of Homeland Security initiated proceedings against the respondents pursuant to authority contained in Section 240 of the Immigration and Nationality Act (hereinafter "the Act"). Proceedings were commenced with this Court by the filing of the Notice to Appear. 8 C.F.R. 1003.14(a); Exhibits 1.

At a hearing before the Court, the respondents, through counsel, acknowledged receipt of their various Notices to Appear. The respondents waived the statement of the nature and purpose of the proceedings, advisals of rights, and reading of the

charges. Counsel on behalf of the respondents in their cases entered pleadings for the lead male respondent, Adnan Bushati, and the lead female respondent, Balbona Bushati, to charges under Section 237(a)(1)(B) and for the two chil&en on charges under Section 212(a)(6)(A)(i)(I) of the Act.

In the case of the lead male respondent, he conceded he was not a native or citizen of the United States, but rather was a native and citizen of Albania. Respondent admitted entry into the United States on November 9, 2001, as a non-immigrant visitor for pleasure and acknowledged that he remained longer than permitted by the terms and conditions of his admission. The respondent conceded that he was subject to removal under the provisions of Section 237(a)(1)(B) of the Act. The respondents' pleadings were taken on August 28, 2004. The lead respondent declined to designate a country to which removal would be directed and the Court at the request of the Department of Homeland security (DHS) designated Albania, the country of nationality and citizenship.[1]

Counsel then on behalf of Balbona Bushati admitted that she was not a citizen or national of the United States, but rather a native and citizen of Albania. She further admitted that she came to the United States at New York on or about February 7, 2002, as a non-immigrant visitor for pleasure who was authorized to remain in the United States for a temporary period not to exceed August 6, 2002, and remained beyond such date without the authorization

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[1] The respondent at the hearing held on August 28, 2004, did not assert any other time, place or manner of entry.

of the Department of Homeland Security. The Court has also designated Albania as the country of nationality and citizenship as the country to which removal would be directed.

In the case of the two minor children, the respondent, through counsel, acknowledged receipt of their Notices to Appear and counsel on behalf of each of the minor respondents admitted as alleged on the Notice to Appear that they were not citizens or nationals of the United States, but rather natives and citizens of Albania, who came to the United States through an unknown port at an unknown date and entered without admission or parole by an immigration officer. He further conceded that the children were subject to removal as charged under Section 212(a)(6)(A)(i) of the Act. Albanian in both cases was designated as the country to which removal would be directed.

Based upon the admissions of the parties, I do find that charges of removal are sustained by clear and convincing evidence. In the case of the two adult respondents, their admissions establish dates and place of entry as non-immigrant visitors. Moreover, in the case of the minor children, the respondents have not come forward with evidence to establish time, place and manner of entry by clear and convincing evidence.

The respondents declined to designate countries as indicated and Albania was directed. The lead male respondent requested the opportunity to pursue an application for asylum under Section 208(a) of the

Act.[2] An application for asylum under this provision of law is also considered an application for withholding of removal under Section 241(b)(3) of the Act. Alternatively, respondents requested consideration of Article III of the Convention Against Torture. Respondents initially requested the relief of voluntary departure. However, on today's date, counsel for the respondents has withdrawn the request for voluntary departure.

The lead male respondent in this case has not met the requirement of showing by clear and convincing evidence that he applied for asylum within one year of his last arrival to the United States. See Section 208(a)(2)(B) of the Act; 8 C.F.R. 1208.4(A)(2).

Today, the respondent claims entry into the United States on December 10, 2003. The respondent claims that following his arrival in the United States, he received a call from family in Albania some time in May of 2002 and he returned to that country where he remained until he departed traveling back through Canada with his son, Eugent, and entering the United States without being admitted or paroled somewhere along the Canadian border.

Today, the respondent testifies that upon arrival in the United States, he lost his Albanian passport at some point. He testified that in order to depart the

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[2] The asylum application is submitted on behalf of the lead male respondent. The decision will therefore discuss his claims with references to other family members where appropriate. Family members may derive the benefits granted to a principle applicant for asylum without the necessity of establishing an independent right to the relief.

United States he made arrangements with someone he met in a coffee house in the city of Warren who arranged for him to be smuggled into Canada where he traveled to Toronto, Ontario, Canada. The respondent claims that he resided with a cousin for some three weeks in Toronto, Ontario, Canada, while arrangements were made for him to leave Canada and enter Albania. The respondent claims he traveled by plane to Greece and from there took a taxi into Albania and ultimately to his home in the north of Albania.

The respondent has the burden to establish clear and convincing evidence, establish the date, time and place of admission. Respondent has not met this burden. The respondent's testimony before the Court with respect to his time, place and manner of entry, as well as with respect to his departure, has been unsupported by any affidavit or other independent evidence. The respondent claims when he departed the United States that he stayed with relatives in Toronto, Ontario, Canada. He has not presented any evidence from these individuals showing that he was in Canada some time in May of 2002. He claims that when he departed from Albania to return to the United States he went first to Tirana, Albania where he resided with cousins for a period of some several months prior to being able to make arrangements with smugglers to leave that country.

The respondent claims that he and his son traveled through Italy, to Canada, and ultimately were smuggled into the United States. He has presented no documentary evidence to establish his means of transportation or travel. The respondent presents no airline tickets, no receipts, no boarding passes, no names of airlines or the names in which they traveled

so that the point of time for his travel with his son could be otherwise independently verified.

Moreover, the respondent has presented no affidavits from the relatives that he lived with in Tirana. Respondent has presented two documents which he claims show his presence in Albania. One is a discharge paper purportedly from a hospital. See Exhibit 2, Tab I and J. The respondent has presented no originals. The respondent claims that these papers were given to him following his treatment in an emergency room for a beating sustained at the hands of the Albanian police. The respondent states that following this he had an injury to his skull and he was admitted for 24 hours to a hospital in Shkoder, Albania. The respondent has presented a discharge and a medical epicrisis document.

What is interesting is that the respondent claims that he was struck and injured in the head requiring treatment and stitches. He was bleeding from a head wound. Yet the medical epicrisis makes no mention of bleeding or treatment. The respondent was rather noted to exhibit lightheadedness, nausea and pain in the upper limbs, shoulder and back, and while it mentions x-rays of the head being taken in the medical epicrisis, it does not mention a head wound. See Exhibit 3, Tab J.

Moreover, it appears that the attending physician who signed the discharge was a urological surgeon. Urology being the study of the kidney and other urological connected matters. It is rather surprising that the discharge in this case and the attending physical would be a urological surgeon. The respondent has presented no original documents. He

has not stated how he obtained these documents. There is no foundation laid for their reliability and there are certain questions concerning it.

Even if this were to be accepted as a valid document, it does not establish that the respondent's application was filed within one year of his admission to the United States. The application was not filed until June 10, 2004, and while the document shows discharge in Albania on June 2, the respondent has submitted no evidence to establish when he actually left Albania and, in fact, entered the United States. It is certainly possible that all of this could be accomplished prior to June 10.

It is the respondent's burden to establish by clear and convincing evidence the date, time and place of admission. He has failed to meet this burden. He has failed to submit credible corroborative evidence of this. The respondent's son allegedly traveled with him, yet counsel did not question this individual with respect to the time that he entered the United States with his father and, indeed, in the questioning on direct examination by counsel, no mention in fact was made of the fact that his father came to Albania at or about the time of his alleged kidnaping.

The Court therefore finds that the respondent has failed to meet the burden of establishing timely filing of the application for asylum. Section 208(a)(2)(D) of the Act; 8 C.F.R. 1208.4(a)(4). Nevertheless, the Court in order to provide a complete record on appeal will address the issues of asylum.

The respondent was advised of the consequences of knowingly filing a frivolous application for asylum. 8

C.F.R. 1208.2(l). Prior to the admission of the application for asylum, the respondent was given an opportunity to make changes, alterations or corrections to the document. He then swore or affirmed before the Court that he knew the contents of the application including all attachments and supplements submitted by him or on his behalf and that they were true and correct.

Respondent's Claim

The evidence at hearing consisted of the testimony of the respondent, his son who is also a respondent, a copy of his application for asylum, a copy of the birth certificate of the respondents as well as the family certificate for the Bushati family, and an Albanian family certificate for the respondent's father's family, a copy of a verification from the Democratic Party of Albania, and a verification from the lege affiliate of the Formerly Politically Persecuted, and a copy of a verification from the ministry of public order in Albania, and concerning a Qazim Bushati's sentence in 1945 and the forfeiture of an estate. See Exhibit 2.

Additionally, respondent has submitted four verifications from the Democratic Party of a Lorenc Luka, an Association of Politically Persecuted verification from a Bardhyl Lohja, a subdivision chief verification from Shkoder, Albania, a verification from an Ibrahim Agovi, an Afram Muka, and the aforementioned hospitalization records. See Exhibit 3, Tabs A through J.

The Government has submitted a copy of the Profile of Asylum Claims and Country Conditions for Albania from May of 2001 and March of 2004, as well

as the State Department Country Reports on Human Rights Practices for Albania. Additionally, the Government has submitted articles on the July 2005 elections in Albania. See Exhibit 4, Tabs A through D.

The respondent claims that he seeks asylum based upon his political opinion and alleges that his treatment and membership in a particular social group. The respondent claims that he and family members experienced mistreatment in the past because of his Democratic political opinions. A number of his relatives have been jailed or executed because of political opinions by the Communist regime in Albania. The respondent claims that one of his uncles was executed without trial by the Communists. The respondent goes on to state that he would be physically hurt, jailed, for no other reason than his political opinions and leaving the country after being summoned before the prosecutor's office for the city of Shkoder for questioning regarding his involvement in the Democratic Party. See Exhibit 2, part B, questions 1A and B.

The respondent goes on to claim that beginning in 1991 until his departure he has been detained by the police on several occasions beginning with three detentions in the year 1991, where he has been detained variously for two to three days, threatened with his life and the life of family members because of his participation in the creation of the Democratic Party.

The respondent also claims that beginning again in July of 1997, he was arrested by the police for participating in a protest against the manipulation of elections and detained again on September 1 where he

was held for two days. During all of these detentions, he was brutally beaten and threatened with imprisonment as well as threats to family members.

The respondent claims that on September 14, 1998, while returning home from the funeral of Azem Hajdari, he was held for 24 hours, beaten and threatened for using a car to give a ride to other Democratic Party members to attend the funeral.

Respondent claims again that he was detained on October 10, 2000, after the local elections, kept in jail for three days, beaten, threatened with being "disappeared." The respondent claims that his wife was detained in September of 2001, kept under psychological pressure, also mistreated and threatened.

The respondent claims that in May of 2002 there was an attempt made to kidnap his son by unknown individuals in the city of Shkoder and on May 5, 2003, he himself was again detained by the police of Shkoder for 48 hours, on May 30 and 24 hours on May 5. During this time he was physically maltreated, beaten, threatened with long jail sentences. The respondent claims that in August of 2003 he was summoned for questioning before the district prosecutor's office in the city of Shkoder. See Exhibit 2, part B, question 1A and B.

After leaving his country the second time, the respondent claims that he traveled through Italy, Canada and ultimately arriving in the United States. The respondent claims that he made no application for asylum in any other countries because he believed the

United States to be the free-est, most Democratic country, and this is the country he intended to come to.

Statement of the Law

The respondent bears the evidentiary burdens of proof and persuasion in his applications for asylum and withholding of removal. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1998); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000).

In order to establish eligibility for asylum based on a well-founded fear of persecution, the respondent must establish that he has a fear of persecution in the country of nationality or last habitual residence based upon his race, religion, nationality, membership in a particular social group, or political opinion. The respondent must establish that there is a reasonable possibility of suffering persecution should he return and that he is unwilling or unable to return or to avail himself of the protection of that country because of such fear. 8 C.F.R. 1208.13(b)(2).

The test for asylum has both an objective and subjective component. See Perkovic v. INS, 33 F.3d 615, 620-21 (6th Cir. 1994). The applicant must actually show that he fears that he will be persecuted upon return to his country and present evidence which establishes that there is an objective situation under which his fear could be deemed to be reasonable. Id. at 620-21, citing INS v. Cardoza-Fonseca, 480 U.S. 421, 431.

While the Act provides no definition of "persecution," in Mikheilevitch v. INS, 146 F.3d 384

(6th Cir. 1998), the Court determined that "persecution" within the meaning of Section 101(a)(42)(A) requires more than a few isolated incidents of verbal harassment or intimidation, accompanied by physical punishment, infliction of harm, or significant deprivation of liberty. Id. at 390.

The grant of asylum, unlike that of withholding of removal is discretionary. Matter of Mogharrabi, supra at 447. The persecution feared by the asylum applicant has to be more than simple harassment, brief confinement or interrogation. Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998); Matter of D-L- and A—, 20 I&N Dec. 409, 412 (BIA 1989).

It should be noted that the well-founded fear standard for asylum is more generous than the clear probability standard of withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). An alien seeking withholding of removal from any country under Section 241(b)(3) of the Act must show through facts a "clear probability" that his life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Stevic, 467 U.S. 407, 413 (1984); Popova v. INS, 273 F.3d 125 (9th Cir. 2001); Mikheilevitch v. INS, supra. "Clear probability" means that the respondent's facts must establish that it is more likely than not that he would be subject to persecution on the grounds specified.

The applicant for withholding of removal under the Convention Against Torture bears the burden of showing that it is "more likely than not" that he would be tortured if removed to the proposed country of

removal. 8 C.F.R. 1208.16© (2); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000); see also Lee v. Reno, 237 F.3d 591 (6th Cir. 2001).

For an act to constitute "torture" it must satisfy each of the five elements in the definition of torture found in the regulations. See 8 C.F.R. 1208.18(a). The act must cause severe physical or mental pain or suffering. The act must be intentionally inflicted. The act must be inflicted for a proscribed purpose as defined in the regulations. The act must be inflicted by or at the instigation of a public official or with the consent or acquiescence of such official who has custody or physical control of the victim. Finally, the act must not arise from the imposition of lawful sanctions. Matter of J-E-, 23 I&N Dec. 219 (BIA 2002).

Perhaps the most important distinction in the applications for withholding of removal under the Torture Convention and those under Section 241(b)(3) of the Act is that under the Torture Convention it is not necessary to link the harm faced with any of the five grounds protected under the provisions of Section 101(a)(42)(A) relating to applications for asylum and withholding. The Convention instead focus on the particularized fear of torture rather than persecution and the nature of the act who is inflicting the harm. Castellano-Shicallum v. INS, 341 F.3d 533 (6th Cir. 2003). The term "activity constituting torture" does not refer to general violence. Rather, the referenced activity must be the very torture the applicant claims to fear. Matter of S-V-, supra. The existence of consistent, varying, or gross, flagrant or mass violations of human rights in a particular country does not as such constitute a sufficient ground for determining that a particular person would be in

danger of being subjected to torture upon his return to that country. Castellano-Shicallum v. INS, supra.

Credibility, Analysis, and Facts and Law

In all applications for relief, the Court has to make a threshold determination on credibility. See Matter of O-D-, 20 I&N Dec. 1039, 1081 (BIA 1998); see also Matter of S-A-, 22 I&N Dec. 1328, 1331 (BIA 2000); Matter of Pula, 19 I&N Dec. 476 (BIA 1987). An applicant's own testimony can be sufficient to meet the burden when it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the fear. Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989). However, testimony is not considered credible when it is inconsistent, contradicted by current country conditions, or inherently improbable. Matter of S-M-J-, 21 I&N Dec. 722, 729 (BIA 1997).

While omissions of facts in an asylum application or during testimony would not in themselves support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies may provide specific and cogent reasons to support an adverse credibility finding. Matter of AS, 21 I&N Dec. 1106, 1109-1110 (BIA 1998).

In this case, the respondent's testimony with respect to dates of events has certainly been consistent with the application which he filed. The respondent discussed three events in 1991 and the dates were relatively consistent with respect to the other dates which he stated. However, what is omitted from the application for asylum in this case is certain detail which respondent does discuss in his testimony. With

respect to his testimony before the Court, the respondent claims that the events from 1997 forward primarily arose out of his activities with respect to the Democratic Party, but most particularly in July of 1997 with respect to his actions as a commissioner of the elections which were held in late June.

The respondent claims in testimony before the Court on direct examination that on July 5, 1997, he was taken and arrested and the police told him that the reason that he was detained for three days and brutally treated was because he had reported stolen votes by the Socialist Party. On questioning by the Court, the respondent acknowledged that a formal written report had been signed by all members of the Democratic Party who were part of the election commission and that this report was given both to foreign observers as well as a copy being filed with the Albanian appellate court. The respondent was asked why no record of this claim was provided to the Court and he indicated that it had not been requested by his attorney.[3]

With respect to the detention in October of 2000, the respondent again stated that he had filed a report of election fraud. In this case, he states that he telephoned the report to the chairman of the Democratic Party, an individual by the name of Astrit Bushati who he identifies as a relative. Respondent states that on October 10, 2000, he was then arrested, held for two days.

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[3] The respondent throughout the proceedings would repeatedly claim that no claims of the requirement of filing additional documentary evidence was asked of him by his attorney.

The respondent claims that because of the reports of the number of votes being stolen, massive demonstrations broke out all over Albania and this was the reason the respondent was arrested. The respondent submitted no evidence by way of newspaper articles, media reports or otherwise to verify his claim that massive demonstrations, in fact, occurred at the time he claimed, and more importantly, submitted no affidavit which reflects that these demonstrations were linked to his reporting of the stealing of votes.

The Court notes that the respondent submitted an affidavit from Astrit Bushati which basically simply states that the respondent was a member and activist of the Democratic Party and has been a "contributor in the electoral campaigns of the Democratic Party." He states that he was a member of the commission in 1997, but there is no mention of the detention of the respondent in July of 1997, nor is a mention made of the report made allegedly to this individual which resulted (a) in the arrest of the respondent in October of 2000 and in the outbreak of massive demonstrations. Interestingly, the respondent does not state in his application with respect to the detentions in July of 1997 or in October of 2000 that he was detained as a result of his election practices or indeed his membership in the election commission. See Exhibit 2, part B, questions 1A and 2.

The respondent claims that in September 14, 1998, while returning home from a funeral, he was held for 24 hours, beaten and threatened with his life for using his car to give a ride to other members of the Democratic Party. Today in talking about the Azem Hajdari incident, the respondent made no mention of

the fact that he had been detained because of his driving individuals to the funeral. Rather, in his testimony, the respondent testifies that he was arrested during the funeral and charged with having caused the turmoil which surrounded the funeral of Azem Hajdari in the city of Tirana. This is a significantly different basis for the arrest than the respondent asserts in his application.

The respondent claims that he was detained again on May 5, 2003 by the authorities because he had taken part in unauthorized protests. The respondent himself testified that during this period, he with others were going through the streets participating in challenging the actions of the Socialist Party. The respondent claims that he was told that the reason why he had been arrested was he had been participating in an illegal demonstration. The respondent claims he was held for 24 hours, beaten, threatened with the disappearance of his family. The respondent states that later on in the month he was held for two days, struck on the head, and whereupon his release went to a hospital for treatment. See Exhibit 3, Tabs I and J.

The respondent claims that the final blow to him was in August of 2003 when he received his summons or notice directing him to appear before the procurator or prosecutor where an inquiry would be made into his activities on for the Democratic Party. He states that the letter he received stated that he was to appear before the police. The respondent was asked on cross-examination why he did not present the letter. However, he had no response and indicated that it was not requested.

During the course of his testimony, the respondent made no mention of the arrest of his wife in 2001.

The only corroborating evidence of any specificity was the testimony of his son, Eugent, who appeared to testify about an attempted kidnaping in May of 2002. Eugent Bushati testified that while walking on the weekend, a car stopped. He saw a driver and someone from the rear of the car jumped out, grabbed him, attempted to force him into the vehicle. On questioning on direct examination, he testified he did not know who they were. He stated the car had no markings. It had dark mirrors and no license plates. He was able to successfully escape them and seek refuge with some individuals. He stated no police report was filed. He believed them to be police officers who attempted to kidnap him because of his father's prior problems.

The respondent presented so-called verifications, four of which were from Lorenc Luka. These are very general statements. The first one mentions the fact that the respondent was detained and maltreated, especially during the year of 1991 and referenced his wife's detention. The second submission also dated June 11, 2004 by the same individual, states that the respondent had a series of problems with the police that continued many years. The third document dated July 11, 2004, also says the respondent has had a series of problems with the police because of his participation in the Nonelik Movement and obliged to leave Albania with his son because of this. And the fourth document, also dated June 11, 2004, indicates that during the first week of 2002 there was an attempt by unknown individuals to kidnap Eugent Bushati.

The respondent states that this followed a series of threats toward the family of Adnan Bushati because of their activities in the Democratic Party. The next document submitted by the Association of Formerly Politically Persecuted is also dated June 11, 2004, as is the document from a subdivision chief which may be signed, however the name is not there. Both of these indicate that the verification from the Formerly Politically Persecuted states that since 1991 they have been active in the association and because of the political activities had problems with the police.

First, the Court notes that all these documents were not submitted in the original. None of the documents were shown to the respondent during the course of testimony. He was not able to explain how he obtained them and indeed inquiry was not made with respect to that. There was no explanation for the submission of four documents from the same individual. The documents are all very generalized with little or no specificity and allusion to problems with the police and a statement of support for the Democratic Party or political activities. This is not the type of specific, direct or corroborative evidence which is given any great weight in this case, particularly since it appears to be significantly contrary to the Profile of Asylum Claims and Country Conditions.

With respect to that, the Government submitted the May of 2001 report which specifically addressed issues of elections and the tampering of elections as well as the treatment of individuals who sat on election commissions. The report notes that the elections were carried out in a calm and orderly manner and with very few incidents of violence, and

were by international monitors, determined to have been free and fair. See Exhibit 4, Tab C, page 5.

It also notes that many claims are made by individuals on the basis of their activities in election commissions and with specific respect to election monitors and commission members, the Profile from 2004 notes that there has not been a pattern of physical reprisal, severe or repeated post 1997. A review of reports by international observers and human rights organizations made no mention of such occurrence which supported the conclusion that there was no pattern of such behavior. The report goes on to note that those who filed formal complaints with respect to the October 2003 elections did not have any reasonable fear of reprisal. See Exhibit 4, Tab B, page 5 and 6.

The documents and the reliability of documents is also addressed in the May of 2001 Profile and particularly is noted that documents issued by Albanian medical practitioners are rarely reliable and that forged documents are common. See Exhibit 4, Tab C, page 4. It goes on to note that there is virtually no evidence that individuals are targeted on political grounds. Rather, it notes that crime, particularly in the post 1997 period, was significant and Albanians had more to fear on those grounds than on political persecution grounds.

The Profile of Asylum Claims both for 2001 and 2004 in several instances do note the lack of reliability to not only official documents but the so-called verifications. In this case, as previously noted, there has been no foundation for the reliability of these documents that has been submitted. Certainly no

originals have been submitted and the Government has had no opportunity to examine them, nor has this Court.

The troubling aspect in this case is that there is an individual who is, while indeed part of the proceeding, would have direct and specific knowledge of the events which the respondent claims, and that is his wife, his co-respondent, Mrs. Bushati. Mrs. Bushati and the respondent were married in 1985. They were married during all pertinent times. Yet the testimony of respondent Balbona Bushati was not offered in this case. She was present today. The application contains a claim that she herself was detained. Yet Mrs. Bushati did not testify and no explanation was provided for her failure to testify. Clearly, Mrs. Bushati who is the individual who allegedly provided medical treatment to the respondent on several occasions following his beatings would be an individual whose testimony would be pertinent and corroborative of the claims. Yet this Court is without any explanation for her failure to testify.

It is the compendium of issues in this case which undermine the respondent's credibility. He has presented documents. However, the documents are copies. There is no foundation for their admission. This Court is at a loss as to how the documents were obtained, where they were obtained. Several of the documents, the verifications, were all produced on the same day and the language is markedly similar. The respondent has not identified the handwriting of any of the individuals, nor indeed has he testified that these were individuals who held the positions which were asserted.

In sum, the respondent has not met the burden of establishing credible testimony with credible corroborative evidence. As the Board held in Matter of Dass, where it is reasonable to expect corroborative evidence for certain alleged facts, particularly those which go to broad allegations regarding general conditions which may have existed, the evidence should be provided or there should be an explanation for the failure to present it. See Matter of S-M-J-, supra.

The respondent seeks asylum on two grounds. First is on political opinion and the second is on membership in a particular social group. The respondent has presented no evidence of his claim or with respect to the social group. The Board defined a social group as individuals holding an immutable characteristic or common trait such as sex, color, kinship, or shared past experiences. See Matter of Acosta, 19 I&N Dec. 233.

The respondent in this case has not submitted any evidence to establish what the social group claim is or credible evidence of how he has been singled out for harm as a result of his membership in a particular social group. While the Court acknowledges that there is no such necessity if there is a pattern and practice of persecution of others similarly situated, nevertheless, the respondent must submit evidence to show persecution of others similarly situated. See 8 C.F.R. 1208.13(B)(2). Here the respondent has not done so. The Court cannot find that the respondent has met the burden of establishing asylum or withholding of removal on this ground.

The respondent has failed to establish a credible claim for asylum in this case. However, even assuming that the respondent had established past persecution in this case, the Government has submitted evidence which does show that the respondent does not have a well-founded fear of persecution should he return to his country due to a fundamental change in circumstances in Albania. The Government has submitted evidence which shows that the elections in summer of 2005 have returned to power Sali Burisha and the Democratic Party. It is the Government's burden to show that conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of persecution should he return. See 8 C.F.R. 1208.13(b).

In this case, the respondent has submitted a number of documents showing that the Democratic Party has returned, that the election was won by Sali Burisha and that he has taken up governance in that country. See Exhibit 4, Tab D.

Once changed circumstances have been established, the burden shifts to the respondent to show the reasonableness of his fear from any new source of harm. Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998). Unless the alien establishes a well-founded fear of future persecution from a new source of harm, the application for asylum will be denied absent compelling circumstances otherwise based on past persecution. See Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

In this case, the respondent himself testified that when the Democratic Party came to power in 1992 he had no problems, that his life was fine. His

circumstances changed. He became a businessman and lived and functioned in his country with no issues. Clearly, the elections of 2005 have returned the political party to which the respondent himself belongs. The respondents claims, therefore, of a fear of persecution in the future are not supported by the changed circumstances which has been submitted. The respondent himself has submitted no evidence to establish that since the elections of 2005 until now, March of 2006, that there has been any systematic efforts on behalf of leftist extremists who are unable to be controlled by the government to harm individuals such as himself.

The Court therefore finds that the respondent has failed to establish a well-founded fear of future persecution or indeed a clear probability of persecution should he return to his country.

The respondent seeks protection under Article III of the Convention Against Torture. The Convention Against Torture is prospective. While past torture may be considered, the respondent's fear of torture in the future must be supported by objective evidence. See Matter of S-V-; see also Matter of J-E-, supra. In this case, the government of Albania is a coalition government headed by the Democratic Party. The respondent's claims of fear of persecution by the Democratic Party are not supported by his testimony or indeed any evidence in this case.

With respect to the respondent's claims of events in 1991, the Court notes that these events occurred under the former Communist government of Albania. That government was ended and since that time there have been at least four other governments which have held

power in Albania. The respondent has submitted no evidence to establish that the Communist government is the same government which was in power in 1997 or indeed continues to harbor any animosity or intention to harm this respondent.

The respondent has not met his burdens of proof on any of the forms of relief before this Court. The respondent has withdrawn his request for voluntary departure and based on the foregoing, the following orders will be entered in the case of each of the respondents in this proceeding.

ORDER

IT IS ORDERED that the respondents' applications for asylum, withholding of removal, and Convention Against Torture be and hereby are denied, and

IT IS FURTHER ORDERED that the respondents, and each of them, be removed and deported on the charges contained in their Notices to Appear to Albania.

/s/
ELIZABETH A. HACKER
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 08-3291

[Issued March 31, 2009]

ADNAN BUSHATI; VALBONA BUSHATI, EUGENT BUSHATI; ERISA BUSHATI,	)
Petitioners	)
v.	)
ERIC H. HOLDER, JR., Attorney General,	)
Respondent	)

ORDER

BEFORE: MERRITT, COLE, and SUTTON, Circuit Judges

Upon consideration of the petition for panel rehearing filed by the petitioner,

It is **ORDERED** that the petition for panel rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ _____

Issued: March 31, 2009